In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 447

ALABAMA HIGHWAY EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, which affirmed the Commission's approval of the application of Deaton Truck Line, Inc. (Deaton), pursuant to Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. § 5(2)(a)), to purchase a portion of the motor carrier operating rights of Edward D. Lavender (Lavender). Appel-

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lants are motor carriers which appeared as protestants in the Commission proceedings.

Lavender's interstate operating certificate sought by Deaton authorized services between Memphis, Tennessee, and Savage, Mississippi, over a prescribed regular route, and also service between Memphis and the off-route point of Nesbitt, Mississippi, less than 20 miles from Memphis (J.S. 23a). Deaton held interstate certificates authorizing the transportation of general commodities over irregular routes between Atlanta, Georgia, and Birmingham, Alabama, on the one hand, and points in Mississippi on the other. In 1959 Deaton and Lavender began interlining general commodity shipments to and from Memphis at Nesbitt, thus providing an irregular-route service between Memphis and Birmingham and Memphis and Atlanta. (J.S. 15a–16a). To operate between Nesbitt and Memphis over the prescribed regular route between Savage and Memphis, it is necessary to travel over secondary roads, one of which is unpaved. Since the shortest practicable route between Nesbitt and Memphis is U.S. Highway 51, Lavender used Highway 51 rather than the prescribed regular route between Memphis and Savage for this traffic (J.S, 14a).

In 1963 Deaton sought Commission approval to acquire Lavender's certificate and thereby replace the Deaton-Lavender interline with single-line service by Deaton to and from Memphis. Appellants argued that there had not been sufficient authorized service under Lavender's certificate; that the interline service over U.S. Highway 51 was not authorized by the certificate; and that therefore the certificate was dormant

and not transferable (J.S. 11). The Commission rejected this argument, finding that Lavender's off-route service over Highway 51 was within the authorization of the certificate (J.S. 14a), and approved the purchase. However, the Commission imposed the condition that the certificate be redescribed in irregular route terms. The effect of this was to authorize Deaton to use Highway 51 (J.S. 15a–16a), as Lavender had.[1] In addition, the Commission limited the irregular-route authority newly conferred on Deaton to service between those towns which previously had been served by Lavender's regular-route operation (J.S. 16a).[2]

The court below unanimously sustained the Commission's order, holding that the Commission had not exceeded its authority in requiring a redescription of Lavender's certificate or in finding that Lavender's certificate was not dormant, and that the Commission's

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[1] A regular-route certificate authorizes the carrier to perform service over specifically stated highways between named points. An irregular-route certificate authorizes the carrier to operate between stated points or within named areas over any available route, but limits it to call-on-demand service, in contrast to service performed regularly or on a fixed schedule, which is permitted under a regular-route certificate. See *Transportation Activities, Brady Transfer & Storage Co.* v. *United States*, 47 M.C.C. 23, Commission sustained, 80 F. Supp. 110 (S.D. Iowa), affirmed *per curiam*, 335 U.S. 875.

[2] The Commission also noted that the transportation needs of the small towns covered by Lavender's certificate were not sufficient to support profitable regular-route operations and would be better served by the call-on-demand service provided by an irregular-route authorization, and that redescription of the certificate in irregular-route terms would result simply in continuing the existing irregular-route service previously performed by the Deaton-Lavender interline operation.

findings were supported by substantial evidence (J.S. 6a–9a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Appellants' contention that Lavender's certificate is dormant because of a lack of sufficient authorized service is without merit. The Commission customarily interprets certificates authorizing service between an off-route point and the terminal as permitting operations over the most direct practicable route between the two points even though such operations involve no movement over the particular roads named in the certificate. *National Transp. Co.—Purchase—North Branford Transport,* 65 M.C.C. 545, 70 M.C.C. 55; *Ferguson Freight Lines, Inc., Modification of Certificate,* 53 M.C.C. 91. Lavender's operations over U.S. Highway 51 were, therefore, within the authorization conferred by his certificate. The evidence of such operations, together with the evidence of Lavender's local service over the certificated route to the extent traffic was available, led the Commission to decide that Lavender's certificate was not dormant (J.S. 13a–14a).[3] The court below correctly concluded

[3] The Commission's rule has long been to preclude transfer of a certificate as dormant "only where the evidence clearly shows that service to and from particular points or areas has been abandoned or discontinued for substantial periods of time and other evidence to overcome the conclusion of dormancy has not been presented." *Central Wisconsin M. Transport Co.—Purchase—Carlstedt,* 85 M.C.C. 305, 308 (1960). Compare *Wooton—Purchase—Columbia Truck Exp.,* 49 M.C.C. 586, 593 (1949), cited here by the Commission.

that the Commission's interpretation of the certificate was reasonable and that the findings were supported by substantial evidence (J.S. 8a–9a).

2. Appellants also contend that the Commission exceeded its authority under Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. § 5(2)(b)) [4] in requiring that Lavender's certificate be redescribed in irregular-route terms. They argue that the effect is to grant a new and enlarged service without a hearing to determine whether the public convenience and necessity warrant creation of the new service (J.S. 9–10). In fact, however, the Commission's order does not authorize enlarged operations. The Lavender certificate transferred to Deaton is limited to the towns previously served (J.S. 16a). The only consequences of the change to irregular-route status are (1) to *limit* the carrier to a call-on-demand service (a service Lavender was authorized to provide under his regular-route certificate [5]) and (2) to permit continuation, as a single-line operation, of the service previously performed by the Lavender-Deaton interline operation. The only difference between the service previously performed by the interline and single-line operation resulting from Deaton's acquisition of Lavender's certificate is that one carrier is now permitted to perform a service previously performed by two. This is not an enlargement of the pre-existing service. While generally the Commission will not permit a

[4] Essentially, this provision empowers the Commission in a Section 5 proceeding to impose such terms, conditions or modifications as it finds to be just and reasonable.

[5] *Motor Common Carriers of Property—Routes and Service*, 88 M.C.C. 415, 435 (1961).

carrier to tack its own regular and irregular route certificates together to create a new service more extensive than previously existed (see *Shein* v. *United States,* 102 F. Supp. 320 (D.N.J.)), Deaton does not here seek to join two of his previously held certificates to create a new service, but, rather, by acquiring Lavender's certificate, to continue an authorized service, merely converting it from an interline operation to a single-line operation.

CONCLUSION

For the foregoing reasons, we respectfully submit that this appeal presents no substantial question and that the judgment of the district court should be affirmed.

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